2006 WL 1355971 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts,
Worcester.

COMMONWEALTH,
v.
Jeffery NICHOLS.

No. 05-P-1425.
April 10, 2006.

On Appeal From A Judgment Of The District Court Department, Winchendon Division

Brief And Record Appendix For The Defendant/Appellant

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***i** Table of Contents

Note: Table of Contents page numbers missing in original document

***i** Table of Authorities

A. *Cases Citations*

***1** Issue Presented

Whether the trial court **abused** its discretion in accepting hearsay evidence as reliable in a probation revocation hearing where the statements were made under circumstances that indicate their lack of trustworthiness

***2** Statement of the Case

On April 15, 2004, defendant Jeffery Nichols was placed on probation for operating under the influence of liquor, third offence, which was amended to a second offence (Docket No. 0370 CR 0321) [1] . [Tr. 15]. The court ordered Mr. Nichols to attend a 14 day program following after care recommendations of the court, not to drink or do any drugs and to obey all state and federal laws including all support orders as defined by G.L. 119A and S-A. [Tr. 16].

A complaint issued against the defendant on December 21, 2004 alleging assault and battery on his mother Hope J. Nichols a person 60 years or older with a disability, in violation of G.L. c. 265, § 13K(b). A notice of probation violation dated February 1, 2005, issued against the defendant. [Tr. 14]. A probation violation hearing was held on May 10, 2005 in the Winchendon Division of the District Court (Reynolds, J.). Defense counsel filed a motion to exclude testimonial hearsay based upon the precedence set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). [R. App. 9-10; Tr. 3-4]. The Commonwealth, in its ***3** brief sought introduction of hearsay testimony, it argued that a surrender hearing was not criminal and had a lower burden of proof and therefore the statements should be let in. [R. App. 11-12; Tr. 6]. The court first found good reason why Hope Nichols was not physically present at the hearing. [R. App. 15; Tr. 6]. The court held that hearsay was allowable in probation violation hearings if the court deemed it trustworthy and reliable. [R. App. 13; Tr. 7, 11-12]. The court allowed defense counsel to revisit the motion to exclude hearsay after the evidence was presented. [Tr. 11]. The court also took up a motion to redact medical records, again, under the hearsay rule. [Tr. 11]. The court denied the motion for redaction of medical records. [Tr. 14]. The defendant filed a motion to determine the competency of Ms. Nichols to testify, which motion the court also denied. [R. App. 7-9].

The court issued findings with respect to the violation of probation, ultimately finding the hearsay evidence reliable, and revoked probation. [R. App. 16]. The defendant filed a timely notice of appeal on May 20, 2005. The case was entered upon this Court's docket on October 4, 2005. Because the Supreme ***4** Judicial Court was deciding whether probation revocation hearings were governed by *Crawford v. Washington*, this court stayed the appeal until January 13, 2006 and then to March 13, 2006 for the court to decide the issue. The defendant filed a motion to vacate the stay of appellate proceedings and return to a briefing schedule on March 10, 2006. This court allowed the motion.

***5** Statement of Facts

On December 7, 2004, Nancy Turner, worked as a registered nurse for Visiting Nurses Association ("VNA") in Gardner, MA. [2] [Tr. 24-25]. Ms. Turner received a call from the defendant, Jeffery Nichols, who was en route to the facility concerning Hope Nichols, Mr. Nichols' mother. Upon her arrival Ms. Nichols was taken to an examining room where Ms. Turner observed that she had arrived with multiple bruises, skin tears along with a substantial amount of blood on her right forearm. [3] [Tr. 26-27, 29, 31, 37, 40, 48]. Ms. Turner also testified that prior to December 7, Ms. Nichols had been observed with bruises though she

testified that they were “not black and blue” and that such a mark “is not uncommon for our clients ... because their skin bruises easily ....” [Tr. 30-31]. While Ms. Turner cleaned and dressed the wound, she asked Ms. Nichols how the tear happened. ***6** She replied, “my son did it.” [4] [Tr. 31, 38]. Ms. Turner asked for further details several times, and Ms. Nichols continued to reply that her son did it. [Tr. 32, 39]. Ms. Turner notified her supervisor, Registered Nurse Muriel Conway, of the incident. [Tr. 32]. When Ms. Conway asked Ms. Nichols how this had happened she grabbed Ms. Conway's forearm. [Tr. 39]. Ms. Nichols was described as “very upset,” “agitated,” and “not explaining well” how the tear occurred. [Tr. 32, 37, 39-40]. Ms. Nichols also became aggravated and very upset with the littlest movements of the staff attending her. [Tr. 40]. Ms. Conway called the Montachusett Home Care to report the alleged **abuse**. [Tr. 40-41]. Soon thereafter a staff person from Montachusett arrived to assess the situation, whereupon Ms. Nichols was transported to emergency room at Haywood Hospital. [Tr. 41].

Shortly before this incident, Ms. Nichols had been diagnosed with dementia. [Tr. 43]. The time she spent at the VNA she was observed as being “always forgetful” or rather as having “windows of confusion.” [Tr. 43-44]. She could become confused about very simple facts. [Tr. 44]. However, on December 7, 2005 ***7** those who attended to her did not observe her to be confused and described her as focused on her injury. [Tr.44].

At the hospital, Registered Nurse Kimberly Ann Wojcukiewicz heard Ms. Nichols say that her “son did this to me,” and that he pushed and kicked her. [Tr. 48]. Ms. Wojcukiewicz testified that while she did not use her son's name, she indicated that it was the son she lived with and who took care of her. [Tr. 53]. Ms. Wojcukiewicz also reported the suspected **elder abuse**. [Tr. 49]. She testified that Ms. Nichols was not confused and that she was in fear for her life. Because she was afraid to go home, she was admitted to the hospital. [Tr. 50].

Officer Mark Rose of the Winchendon Police Department became involved in this case on December 9, 2004, when Ms. Nichols' brother, Raymond Dora, reported an altercation between Ms. Nichols and Mr. Nichols. [Tr. 78]. On December 14, Officer Rose spoke with Ms. Nichols just as she was to be taken from the hospital to Birchwood Care Center. [Tr. 82]. According to Officer Rose, she clearly communicated that her son, Mr. Nichols, **abused** her, and she did not seem confused. [Tr. 82, 84]. She told Officer Rose that she ***8** awoke in the morning and “Jeffery began to screaming at her, telling her that he was the boss and to get back to bed, shaking his finger ... and he threw her on the floor, [and] grabbed her by the arms ....” [Tr. 83]. Ms. Nichols indicated that she wished to file charges against Mr. Nichols. [Tr. 83].

That same day (December 14) Mr. Nichols took Ms. Nichols to Birchwood Care Center where she was admitted for respite care. [5] [Tr. 55, 58, 82]. Jody Burgeois, a licensed social worker, spoke with Ms. Nichols who told her that, “she was in the hospital because her son had beaten her up ... [that] he grabbed he arms in a certain way.” Ms. Burgeois also observed the bruising on Ms. Nichols' arms. [Tr. 60]. Ms. Burgeois had her supervisor speak to Ms. Nichols, and they called Montachusett Home Care. [Tr. 60-61]. A couple of days later on December 17, Ms. Burgeois contacted Winchendon Police whereupon Officer Rose was dispatched to the facility. [Tr. 61, 84]. Ms. Nichols again told Officer Rose what had happened, and he told ***9** her she had the option of a restraining order. [Tr. 85].

Ms. Burgeois again spoke with Ms. Nichols who stated that “one night Jeffrey got mad, he came her, pushed her, started hitting her, and she told [Ms. Burgeois] her arms were up ... and he started hitting her, and that he grabbed her arms and shoved her down.” [Tr. 61]. Ms. Burgeois testified that Ms. Nichols was in fear of Mr. Nichols. [Tr. 61]. She wrote [6] an affidavit in support of a restraining order for Ms. Nichols against Mr. Nichols. [Tr. 62]. Officer Rose filed the restraining order in the court clerk's office. [Tr. 86]. Judge Zide issued the order that day. [Tr. 87].

During the conversations about what happened to her, Ms. Burgeois testified that Ms. Nichols never seemed confused and was very clear as to who had done this to her. [Tr. 66]. She also testified that Ms. Nichols suffers from dementia where "she becomes forgetful," but adding that she would not characterize her as confused.[7] [Tr. 72-73].

***10** Officer Mark Rose interviewed Mr. Nichols at his home. Mr. Nichols informed Officer Rose that he woke that morning to his mother hitting him with a metal toolbox. He stopped her with his hand, slid the toolbox under the bed and grabbed her by the arms and led her upstairs. [Tr. 79-80]. No marks or bruises were observed on Mr. Nichols. [Tr. 80]. Officer Rose also testified that Mr. Nichols told him that a companion of his mother's, identified as Debra Coty, had seen Ms. Nichols "banging her arms on the kitchen counter on the corner, and that was how her arms were bruised and injured." [Tr. 81].

Ms. Nichols was not in court to testify because she had a "medical issue []" with "internal bleed[ing]." [Tr. 68, 77] Also, she was passing out and did not look well and could not leave the facility. [Tr. 77]. The Commonwealth presented a letter from Ms. Nichols' doctor, which explained her absence. The court did not admit a letter into evidence. [Tr. 22].

Rhonda Fox, granddaughter to Ms. Nichols on December 8, took the photographs that were introduced into evidence at the hearing depicting the injuries. [Tr. 94-95]. In May of 2002, Ms. Nichols filed and was ***11** granted yearlong restraining orders against Ms. Fox, her parents and her 7 other siblings. Two of the orders were extended. [Tr. 95-98]. Ms. Nichols at that time had filed an affidavit with the court stating that she was in fear of her family members. [Tr. 96]. Ms. Nichols attended these court appearances but did not speak. [Tr. 97]. When the restraining orders issued in May 2002, Ms. Nichols was in the beginning stages of Alzheimer's disease. [Tr. 98].

***12 Argument**

The Trial Court Abused Its Discretion In Accepting Hearsay Evidence As Reliable Where The Statements Were Made Under Circumstances That Indicate The Evidence Was Not Reliable; Due Process Excludes Inherently Unreliable Evidence

Due process demands that evidence, whether rising to the criminal "beyond a reasonable doubt" standard or the civil standard of "preponderance," be reliable. The only people who could have testified from first hand knowledge concerning the alleged **abuse** were Ms. Nichols or Mr. Nichols, neither of which testified. The only testimony presented at the hearing was hearsay that was ultimately accepted by the court as reliable and trustworthy. But the circumstances show that the Ms. Nichols suffered from mental impairments and seemed to be susceptible to the influence of others. While some of the testimony could have come into evidence under the excited utterance hearsay exception, there was a lapse of time between the event and Ms. Nichols' declarations implicating Mr. Nichols. The court **abused** its discretion and denied the defendant due process safeguards when it found the evidence reliable in light of these deficiencies.

A probationer has only a conditional liberty interest. See *Commonwealth v. Wilcox*, 446 Mass. 61, 64 ***13** conditions of probation. A breach of a condition of probation constitutes a violation, and if the probation officer receives information tending to show that the probationer has breached, the officer may "surrender" the probationer to the court. *Id.*, at 64-65. The judge determines whether a violation *in fact* occurred. *Id.*, at 65 (emphasis added). The Commonwealth revokes probation based on evidence of a law violation by proof preponderance of evidence. See *Commonwealth v. Holmgren*, 421 Mass. 224, 226 (1995). A probation revocation hearing is not part of criminal prosecution and, thus, a probationer need not be provided with the full panoply of constitutional protections available at criminal trial. See *Commonwealth v. Wilcox*, 446 Mass. at 67, see also *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

"The revocation of probation does, however, result in a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution[]", and thus, the Commonwealth must provide probationers

with certain protections at surrender hearings. *Commonwealth v. Durling*, 407 Mass. 108, 112 (1990), see *Gagnon v. Scarpelli*, 411 U.S. at, 783; ***14** *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972). The District Court has codified this process in its rules dealing with probation violation, which allow for any hearsay evidence to be used against the defendant. See Probation Violation Rule 5, 6.

To determine whether the use of hearsay evidence in a civil commitment case violates due process, courts need look no further than to its reliability. *Commonwealth v. Given*, 441 Mass. 741, 746-47 (2004). "The hearsay on which the judge relie[s] must be reliable." *Commonwealth v. Nunez*, 446 Mass. 54, 58 (2006). The Supreme Judicial Court has written that unlike the confrontation clause,[8] due process demands that evidence be reliable in substance, not that its reliability be evaluated in a particular manner. See *Commonwealth v. Given*, 441 Mass. at 747 n.9. Evidence ***15** *Commonwealth v. Given*, 441 Mass. at 747 n.9. Evidence that would be admissible under standard evidentiary rules is presumptively reliable for due process purposes. See *Commonwealth v. Given*, 441 Mass. at 747, see also *Commonwealth v. Durling*, 407 Mass. at 118; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), overturned 541 U.S. 36. And hearsay that is inadmissible under the rules of evidence is inadmissible unless the evidence is made admissible by statute. See *Commonwealth v. Given*, 441 Mass. at 743-44.

Here, the evidence introduced at Mr. Nichol's probation revocation hearing was not reliable and failed to meet the standards for admissibility. That evidence consisted of testimony from various persons stating that they heard the declarant, the probationer's mother, say that her son assaulted her. However, Ms. Nichols suffered from dementia and had been diagnosed with Alzheimer's disease years previous. She clearly had some difficulty describing the alleged assaults, and ultimately could not describe with any precision what had happened to her. Mr. Nichols does not contest the fact that his mother suffered injuries on December 7th. The evidence introduced at the hearing, the testimony of the three ***16** nurses, photographs, and medical records, is undisputable. The question is whether Mr. Nichols inflicted the injuries upon his mother. No one observed Mr. Nichols assault his mother; the entire case against him came from hearsay statements Ms. Nichols made to others.

The statements Ms. Nichols made to others are suspect because of her mental condition at the time the events took place. The concern here is that in May 2002 (over three years before this event) Ms. Nichols was in the beginning stages of Alzheimer's disease, [Tr. 98], and at the time of the incident she had been diagnosed as having dementia. [Tr. 43]. Ms. Nichols was observed as being "always forgetful" or rather as having "windows of confusion." [Tr. 43-44]. She could become confused about very simple facts. [Tr. 44]. However, on December 7, 2005 and the subsequent weeks Ms. Nichols was attributed with not being confused and being able to recall the events with accuracy. The mental ability of the declarant was not factored into the court's ruling of reliability. Because the testimonial evidence was made under circumstances that indicate their lack of trustworthiness the court should not have deemed them reliable.

***17** While all of the evidence introduced relied on Ms. Nichols' statements, there are strong secondary reasons for excluding certain evidence under the hearsay rule. The statements to Ms. Turner and Ms. Conway could have been brought into evidence through the firmly rooted excited utterance[9] exception to the hearsay rule. But even if Ms. Nichols' statements to these nurses had been deemed an exception to the hearsay rule, Ms. Nichols statements to these nurses did not implicate Mr. Nichols. Ms. Nichols' testimony to Social Worker Burgeois and Officer Rose which named Mr. Nichols as her assailant, [Tr. 61, 82, 84-85], could not have been considered by the court under the excited utterance exception because Ms. Nichols could not be expected to be under the influence of the December 7th event on December 9th when Ms. Nichols spoke with Officer Rose or on the 14th when she spoke with both Officer Rose and Ms. Burgeois. In the final ***18** analysis of this case even the excited utterance exception is not to be applied "when such statement is made under circumstances that indicate its lack of trustworthiness ...." See Liacos, Handbook of Massachusetts Evidence, § 8.16, p. 555 (7th ed. 1999).

The testimony that Ms. Burgeois wrote the affidavit, [Tr. 62-63], demonstrates a circumstance that creates doubt as to the reliability of the affidavit again because of Ms. Nichols' mental state and possible susceptibleness to outside influences. See *Moran v. School Committee of Littleton*, 317 Mass. 591, 595 (1945) (affidavits are hearsay). See also Liacos, Handbook of Massachusetts Evidence, § 8.1, p. 464. In May of 2002, Ms. Nichols filed and was granted yearlong restraining orders against Ms. Fox, her parents and her 7 other siblings. [Tr. 95-98]. Ms. Fox testified that Mr. Nichols wrote all the restraining orders that

alleged that she was in fear of her of the family members. [Tr. 96]. Ms. Nichols attended these court appearances but did not speak. [Tr. 97]. [Tr. 98]. The circumstances indicate that in May 2002 Ms. Nichols was either in fear of *all* her family except Mr. Nichols or that Ms. Nichols, who was in the beginning stages of Alzheimer's disease, may have been ***19** susceptible to the suggestions of others because of her mental impairments. Ms. Fox's testimony implies that Ms. Nichols was swayable to the insinuations of others.

The hospital records introduced do fall under a statutory exception to the hearsay rule and are therefore reliable under *Commonwealth v. Givens.* See G.L. c. 233, § 79 ("so far as such records relate to the treatment and medical history ... but nothing therein contained shall be admissible as evidence which has reference to the question of liability"). But this exception to the hearsay rule is not all inclusive of hospital records and is a mere codification of the common law declaration as to physical condition. [10] Such an exception to the hearsay rule "[n]arration of circumstances-e.g a patient's story of how injuries were suffered-is not admissible, even if made to a physician." Liacos, Massachusetts Evidence, § 8.14, p. 548, citing *Commonwealth v. Howard,* 355 Mass. 526 (1969); *Commonwealth v. Spare,* 353 Mass. 263 (1967); ***20** *Roosa v. Boston Loan Co.,* 132 Mass 439 (1882). Therefore, even if the medical records indicated Mr. Nichols as the cause of Ms. Nichols' injuries such could not be admissible by the court.

The Commonwealth was under obligation to *prove,* even though the standard was that of preponderance, that Mr. Nichols assaulted his mother. See *Commonwealth v. Holmgren,* 421 Mass. at 226. The Commonwealth failed to establish its burden. Ms. Nichols was diagnosed with Alzheimer's and dementia long before December 7, 2004. This fact must affect the evidence when determining reliability. The circumstances in this case also show that Ms. Nichols could have been influenced by those who were acting out of worry and concern for her to implicate her care giving son. The evidence was not reliable, nor was it admittable under standard evidentiary rules. The offence was not proven even by a preponderance of the evidence standard.

*21 Conclusion

Based on the authorities cited and the reasons aforesaid, the defendant requests that the case be remanded to the District Court with order to reverse the probation violation judgment and dismiss the Notice of Violation.

Appendix not available.

Footnotes

1 Citations to the record appendix will be referred to as "R. App.", followed by the page number on which the cited material appears. Citations to the trial transcript will be referred to by the page number.

2 The Gardner Visiting Nurses Association is an adult care center where clients arrive in the morning and leave in the afternoon. [Tr. 26]. Ms. Nichols' had been a client of the facility since September of 2004. [Tr. 34, 37-38].

3 While Ms. Turner testified that there was possibly a smaller tear on the left arm, [Tr. 31], Ms. Turner's supervisor, Muriel Conway, testified that there was only the single tear on the right arm. [Tr. 37].

4 There was testimony that Ms. Nichols had 6 children, 3 sons and 3 daughters. [Tr. 52].

5 Respite care was defined as "[w]hen a family member goes away, like on vacation or on business, they need some place to put their loved one, that can bring them to the nursing home to be taken care of until they get back." [Tr. 58].

6 The affidavit was in Burgeois' handwriting. [Tr. 63].

7 Ms. Burgeois stated that Ms. Nichols "has some sort of short-term deficiencies, and she may be repetitive with her questions" but that she was never "confused as to the date and time." [Tr. 74].

8 As the United States Supreme Court observed that under the Confrontation Clause, "[r]eliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable." *Crawford v. Washington,* 541 U.S. 36, 63-64 (2004). "Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts." *Crawford v. Washington,* 541 U.S. at 63-64. The ultimate goal must be to also ensure "reliability of evidence" which must also be a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner. *Id.,* at 61-62.

9 A statement made under the impulse of excitement or shock is admissible if its utterance was spontaneous to a degree that reasonably negated premeditation or possible fabrication and if it tended to qualify, characterize, or explain the underlying event. *Commonwealth v. Snell,* 428 Mass. 766, 777 (1999) (domestic **abuse** victim's complaint to neighbor immediately after assault, while highly distraught); *Commonwealth. v. Wheltm,* 428 Mass. 24, 26 (1998) (victim's daughter's statement to police shortly after assault).

10 Expressions of present pain, whether articulate or inarticulate and whether or not made to a physician, are admissible in Massachusetts. See *Murray v. Foster,* 343 Mass. 655 (1962); *Bacon v. Charlton,* 61 Mass. (7 Crush) 581 (1851). See also Proposed Mass R. Evid. 803(3).

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